ADDRESS OF MR. R. FLOYD CLARKE, OF NEW YORK CITY,

ON

Intervention for Breach of Contract or Tort Committed by a Sovereignty.

The implied term in this title is, that a citizen of another sovereignty has been affected by the wrongful act. At the outset a clear line of demarcation must be drawn between tort and contract claims. From the earliest times crimes or torts perpetrated upon the citizens of one country by the government of another have been the main causes of friction between nations, leading in many instances to redress, in some to war. The right of a sovereignty to redress such grievances has been recognized by all. The manner of enforcement of such claims, whether by unofficial presentation, good offices, intervention, or war, is in the discretion of the offended nation.

Not so, however, has it been, heretofore, so far as concerns contract claims. Our original American doctrine on the subject (based partly on Hamilton's early *dictum*) drew a distinction between tort and contract. Mr. Buchanan, Secretary of State, writing in 1848, said:

> In the case of violation of contract, the rule has been not to interfere, unless under very peculiar circumstances, and then only to instruct our diplomatic agents abroad to use their good offices, * * *.

Great Britain adopted a contrary policy. In the debate in Parliament in 1847 as to the nonpayment of about $230,000,000 of interest due on Spanish bonds held by British citizens, Lord Bentinck advocated war as the proper mode of pressing the claim. Lord Palmerston in reply admitted the right of the British Government to wage war against Spain for the recovery of this debt, but denied its expediency under the existing circumstances. He was, however, prompt to add: "But this is a question of expediency, and not a question of power," and warned foreign countries against stretching too far the patience of the British nation.[1]

[1] 6 Moore, Dig. Int. Law, 286.

The same rule was expressed in Lord Palmerston's circular of 1848,[2] and was reiterated by Lord John Russell in 1861.[3]

France and England joined in the sixties in using force to obtain redress on the claims of their citizen bondholders against Mexico.

In 1902 Mr. Balfour, Prime Minister of England, in the debate on Venezuelan matters, said:

I do not deny, in fact I freely admit, that bondholders may occupy an international position which may require international action.[4]

Thereupon, in December, 1902, England, Germany, and Italy sealed their approval of the doctrine of force by opening a bombardment on the Venezuelan coast and enforcing a blockade.

To this consensus of opinion and practice of the greater nations has been opposed the strong protest of all the nations of Latin-America.

Likewise, the publicists are at issue on this question. Hall, Phillimore, and Rivier assert the right to use force. Calvo, Pradier-Fodéré, Rolin-Jaequemyns, F. de Martens, Despagnet, Kebedgy, and Nys assert the contrary rule.[5] Hall states the better rule with precision when he says:

Fundamentally, however, there is no difference in principle between wrongs inflicted by breach of a monetary agreement and other wrongs for which the state, as itself the wrongdoer, is immediately responsible. The difference which is made in practice is in no sense obligatory, and it is open to the governments to consider each case by itself, and to act as seems well to them on the merits.[6]

[2] Lord Palmerston there stated that the question of whether his government should make the matter of nonpayment of foreign bonds a subject of international negotiation was entirely a matter of discretion and not a question of international right. 1 Scott's Hague Peace Conferences, 402.

[3] Lord John Russell, in 1861, wrote: "It has not been the custom of Her Majesty's government, although they have always held themselves free to do so, to interfere authoritatively on behalf of those who have chosen to lend their money to foreign governments." 1 Scott's Hague Peace Conferences, 402.

[4] 1 Scott's Hague Peace Conferences, 402.

[5] Hershey, Article on Calvo and Drago Doctrines, 1 Am. Journal of Int. Law, 37.

[6] Int. Law, 5th ed., 281.

For numerous precedents where governments have enforced contract claims by good offices and arbitration see note.[7]

[7] Article 6 of the Jay Treaty between the United States and Great Britain, 1 Moore Int. Arb. 271; under the Florida Treaty between United States and Spain, 5 Moore Int. Arb. 4504; United States and Chilean Commission, 1892, 4 Moore Int. Arb. 3569; the Venezuelan Bond Cases, 4 Moore Int. Arb. 3616, 3631, 3651; Garrison Case, *ibid*, 3554; the Hammaker Case *v.* Mexico, 4 Moore Int. Arb. 3470; the Idler Case *v.* Venezuela, 4 Moore Int. Arb. 3491; the Central and South American Telegraph Company *v.* Chile, United States & Chilean Arbitrations, 1901, p. 205. For further cases of contract claims, without tortious elements, presented and enforced to the point of arbitration before an international tribunal, see 4 Moore Int. Arb. at the following pages: Herman case, p. 3425; supplies to a war vessel; Hunter case, p. 3426, war supplies; Eckford's case, p. 3429, for building of man-of-war; William S. Parrott case, p. 3429, claim on a bill of exchange against Mexico; Meade's case, p. 3430, delivering to Mexico vessels of war; Zander case, p. 3432, for supplies, which, though unsuccessful, was yet presented and was merely a contract; Underhill's case, p. 3433, for a charter of a vessel to the government; Ulrick's case, p. 3434, for lease of a house for a legation; Union Land Company case, p. 3434, on colonization contracts; there were claims against Mexico for depreciation of scrip arising out of the Texas Revolution, etc., p. 3445; Mary Smith case, p. 3456, an order for $211, not allowed, but presented; Hayes' case, p. 3457, on contract, not allowed, but presented; Rowland's case, p. 3458, for customs receipts, not allowed, but presented; Eldredge's case, p. 3460, for loans and supplies to the government; the Manasse & Company case, p. 3462, supplies of war; the Itarria case, p. 3464, supplies to troops; Newton's case, p. 3465, the amount unpaid on custom house drafts was allowed; Steelman's case, p. 3465, sale of arms to the government; DeWitt case, p. 3466, the Hammaker case, p. 3470, the Idler case, p. 3491, recovery for military supplies; cases of Donnell's Executor and Hollins & McBlair, pp. 2545, 3547, for supplies, sale of provisions; case of Beales, Nobles & Garrison, p. 3548, on an immigration contract; case of Flannagan, Bradley, Clark & Co., p. 3564, Walter's case, p. 3567, customs dues due for building mole and breakwater; Trumbull's case, p. 3569, claim for services as counsel for a diplomatic agent; Hodgkins case and Landreau claims, pp. 3571, 3584, based on discovery in Peru of certain guano deposits and claim against the government in consequence.

Likewise all the cases in which the different governments of the world have pressed the claims of bondholders against foreign governments, even to the extent of intervention and war, are clear precedents that claims for breaches of contract, where gross injustice is apparent, will be insisted upon even in the absence of tortious element of seizure of property.

Among historic instances is the case of the intervention of France and England in Mexico for the protection of Mexican bondholders.

So the intervention of Germany, England, and Italy by bombardment and blockade of Venezuelan ports in 1903 was on behalf of claimants holding merely contractual, as well as other, claims.

Precedents to the contrary may also be found.[8] These consist chiefly of decisions of arbitrators dismissing contract claims on the ground that because they are claims for mere breach of contract they could not be considered on their merits in an international arbitration. The reasons given for this result are either, that they are not covered by the terms of the protocol, that they are not covered by international law, that they can not be enforced because no recourse has been had to the courts of the country, or that the existence of the Calvo clause bars their consideration or compels an adverse decision.

So far as concerns all except the first ground, which is a mere question of verbal interpretation, these decisions are now of little weight. The better view is now seen to be that all these preliminary questions as to whether a claim should be enforced, etc., are in the nature of pleas in abatement which are waived by the consent to arbitrate. They constitute considerations of public policy proper enough to be weighed by the government to whom the claim is presented, but when that government, in spite of their existence, has forced by diplomatic pressure the claim to an arbitration, it is contrary to all ideas of justice that a decision on such arbitration should be made on any other basis than a basis of absolute equity on the merits of the claim.

Arbitration of these matters is a new development of modern international law. It is not surprising, therefore, that in the early cases some arbitral commissioners, consulting authorities stating the principles of policy to be applied by governments to whom the claim is presented, have been misled into thinking such rules of domestic policy merely laid down for ordinary guidance and subject to excep-

Other precedents of insistence upon mere bondholders' claims where of course there was no tortious element of seizure of property, but only the refusal to pay an obligation, are the cases mentioned in chapter 64 of Moore's International Arbitrations. 4 Moore Int. Arb. 3591–3664. See also 4 Moore Int. Arb., Ch. 63, pp. 3425–3490; the Venezuelan Bond cases, 4 Moore Int. Arb. 3616–3651; Garrison *v.* Venezuela, No. 38, U. S. & Venezuelan Claims Commission, 1885; Mayers *v.* Chile, U. S. & Chilean Claims Comm., 1901; Central & South Am. Telephone Co. *v.* Chile, *id.;* DeWitt *v.* Mexico, No. 431, U. S. & Mexico Claims Comm., 1868; Mulligan *v.* Peru, 2 Moore Int. Arb. 1643.

[8] See 4 Moore International Arbitrations, pp. 3467–3484.

tion on occasion, to be a part of the common law, so to speak, of international arbitration. Thus the rule of international law that local remedies must, as a rule, be exhausted,[9] is a rule of policy for the government to whom the application for redress is made. So, likewise, the Calvo clause existing in a concession whereby the concessionaire agrees to relinquish all right of applying to his own government for diplomatic reclamation and protection. Once that government has, on the admitted fact of no recourse to local courts or existence of Calvo clause, demanded and obtained an arbitration, only the merits of the claim as a claim in equity are before the arbitrators. For the essence of the conception of an arbitration, and especially an international arbitration, is that a decision shall be rendered on the merits and that no technicality shall stand in the way of absolute justice being done. Again, it is inconceivable that a government which has demanded arbitration under such conditions has agreed to a vain thing, namely, the defeat of the claim on which it has made the demand on a fact known and apparent at the time of the insistence on arbitration to the government so insisting. So likewise with the government consenting to the arbitration. It must, in view of the essence of the idea of arbitration, be conceived as consenting to a trial on the merits and to a waiver of such a plea in abatement, by the mere act of its consent to arbitrate.

Neglect to realize the application of these obvious fundamental truths as applying to such arbitrations has led to arbitral decisions which are a stench in the nostrils of our noble profession and which, in their unjust results, are sufficient to make the angels weep.

Under these conditions of lack of agreement of the publicists and the precedents on this question, it may be well to examine the reasons for and against the alleged rule of international law that force should not be used in the enforcement of contract debts.

In Secretary Root's well-weighed instructions to the American delegates to the Rio Conference in 1906, as adopted and expanded by the President for the purposes of the Second Hague Conference, may be found a clear appreciation of the rule, and its limitations, and the reasons for it. He says:

[9] 6 Moore Dig. Int. Law, Sec. 987.

It appears that modern public opinion is decidedly opposed to the collection by force of contractual debts * * *. The view of the majority seems to be that the correct rule of international law is non-intervention, but that intervention is either legally or morally permissible in extreme cases.

He then goes on to state that the principle of non-intervention by force would be of incalculable benefit to all parties concerned. First, to the creditor nation in that it would be a warning to prevent its citizens from trading on the necessities of an embarrassed foreign government and then relying on their own government to make the bargain valuable, and further in that it would preserve friendly relations between the creditor nation and the debtor nation and prevent complications with neutrals. Second, the principle would relieve possibly strained relations with neutrals. Third, it would advantage the debtor state whose operations would thus be based solely on its own credit. The alternative of arbitration would appeal as a protection to the honest creditor.[10]

These reasons may be condensed to two general propositions, the horror and inexpediency of risking the evils of war in presenting and enforcing a claim for mere money damages on a breach of contract.

As a matter of balanced evils, what loss of money to private parties on a mere breach of a contract could be weighed in the balance against the crime on humanity which would be perpetrated were such a claim demanded and rejected to lead to war between two great civilized nations, such, for instance, as England and the United States, or the United States and Germany. The thought is almost unthinkable from the mere standpoint of expediency. And yet if there be such a thing as *Jus* in this best of all possible worlds — and the traditions of our profession lead us to assert its existence against all comers — the persistence of that conception and its survival in the course of our evolution has been predicated upon the discarding of the precepts of expediency when in conflict with the precepts of right. And if we are to advance in civilization and morality, this process must continue.

[10] 1 Scott's Hague Conferences, 403, 404.

Since, however, expediency here looms so large, a compromise must be effected, if possible. That compromise is arbitration by consent. And should the arbitration be refused, then since the party refusing assumes to act as judge in his own case to absolve from all liability, then to the end that *Jus* not otherwise to be obtained shall be at least vindicated, "cry havoc and let slip the dogs of war," a course logically defensible since otherwise no progress in the evolution of justice can be made and the thief and despoiler might flourish in the world to the shame of honest men.

Again, on principle and on fundamental reasons of justice and equity, no valid distinction can be drawn between the right or obligation of a government to intervene diplomatically in behalf of its citizen who has been despoiled of his property through a tortious act of a foreign government, and the right, or duty, of a government to intervene on behalf of its citizen who has been despoiled of his property by a gross breach of a mere contract on the part of a foreign government. If the distinction were alleged between the right of a government to intervene for damages arising out of personal injuries as distinguished from damages arising out of injuries to property, some reason for the difference might exist; but not in the case of a mere distinction between a property loss, whether the same results from a tort, or from a breach of contract.

The origin of the rule that a government would not intervene to protect mere contract rights is not far to seek. It will be found that such rule was originally laid down in connection with claims against foreign governments of equally high civilization and of equally high moral attributes as our own, where the presumption was that justice, if justice existed, could be obtained in the ordinary course from that government or its courts.

As between nations of equal military power, equally high civilization, and equally high ideals of justice, any other rule would probably lead to more public inconvenience and loss than could possibly be compensated for by the mere righting, or attempting to right, any particular wrong in any particular instance. For the embroiling of two great civilized nations, such as Great Britain and the United States, over a mere contract claim, into a war, would in itself be

such a great crime against civilization as to preclude the possibility of a resort to such means under such circumstances. Nor, as a matter of practice, in even a tort case would the governments of those great nations be likely to carry their international intervention process to that extent. For even in the great historical instance of the Alabama claims it is not likely that their absolute rejection by Great Britain would actually have led to a war between the countries.

As a matter of fact during the last century, the insistence upon such contract and tort claims between the great nations has led to arbitration and not to war.

The debate as to whether war is a proper mode of enforcing redress on contract claims has only arisen, as a practical question, between the great nations and certain Latin-American countries. These latter asserting their favorite doctrines of Calvo and of Drago to be sacrosanct principles of international law, claim thereunder an immunity bath from all international reclamation regardless of the injustice, if any, perpetrated. Latterly these claims have been treated with scant courtesy. The practice of the great nations, England and Germany, for instance, has been, first to request arbitration, and, on its refusal, to hold these governments to their strict obligations, even to the extent of forcing them to do justice at the cannon's mouth. Witness the blockade and bombardment of Venezuela by the allied Powers in 1902.

It is difficult to see why, under international law, it should be held that intervention (with all its threat of war, etc.) is proper to obtain damages for a seizure of a few barrels of flour, or a coasting schooner worth a few thousand dollars, and at the same time such intervention is improper to obtain damages for hundreds of thousands of dollars invested in a plant valuable only in connection with a concession granted by the foreign country and which, through the revocation of the franchise, has become valueless. The property right infringed is as much property in the one case as in the other. If the question arose under municipal law it could receive but one answer, namely, that if intervention is proper in one case, it is proper in the other.

And here we may call attention to the apparent trend of the evolution of international law along the same lines of development which have taken place in municipal law. For, as shown by the precedents stated above, the bar of the alleged rule that contract claims will not be insisted upon by international action has been repeatedly set aside by modern practice, where otherwise gross injustice would have been perpetrated. In so developing, the evolution of international law is following in the footsteps of the evolution of municipal law.

Going back to the history of municipal law, we find that in its early infancy the only rights as to which any remedies were allowed were crimes. These, at first, merely entitled the injured person or his heirs to a fine.[11] The recognition of the interest of the state in crimes had to await the development of kings. Following this came the recognition of remedies arising out of civil torts, which in the first instance were only recognized as *quasi*-crimes giving individual remedies, and then later on as torts proper. At first no remedies were given on contracts. For, as a matter of fact, since contracts themselves had no place in early civilization, the law of contracts did not exist in municipal law. The law of contracts forms so large a part of our modern municipal law that to say it once had no existence would seem an absurdity. Yet this is true. Maine has shown how the progress of man in society has been a progress from status to contract,[12] and Herbert Spencer enforces the same truth.[13] Within historic time, contract has slowly and painfully developed with the growth of confidence among men.[14] Contracts evidenced by the seal of the party charged, were among the first to be recognized and enforced by the English law. Again, the executed contract of sale, where the property was delivered and the money paid — the *nexum* of the Roman law — seems to be the first contract that the law of Rome and of England took upon itself to

[11] See the Icelandic Saga of Nial, Vol. 10, Anglo-Saxon Classics, 96, 108, 181, 183, Chapters 37, 43, 71, and 72.

[12] Maine's Ancient Law, Chap. IX.

[13] Principles of Sociology — Political Institutions.

[14] Maine's Ancient Law, Chap. IX; 2 Pollock and Maitland, History of English Law, 46; Holmes' Lectures on the Common Law.

protect.[15] Then the courts began to enforce a half-executed sale; so that when a vendor proved a delivery, and a promise, the burden was on the vendee to show payment, the *real* contract of the civil law. And from the time of Henry IV (1399 A. D.) to that of Henry VII (1509 A. D.) a great conflict rages between the authorities as to whether the courts will enforce mutual oral promises, the "Consensual" contracts of the civil law, where witnesses alleging the contract were unsupported by proof of an act of the party charged in itself corroborating circumstantial evidence. The final result was to establish a recovery in this class of contracts. For the evolution of contracts in municipal law see the note.[16]

[15] Maine's Ancient Law, p. 310.

[16] The first case (2 Henry IV. 3b) was a nonsuit because no covenant was produced (using covenant in the sense of a written promise under the party's seal). Yet, Bryan, J., admits the action would lie if the defendant begins to act. In 2 Hen. IV. 33a, a suit for damages for not building a house, Thirning, Ch. J., says: "But when a man makes a covenant" (using covenant in the sense of an oral promise) "and will not perform any part of such covenant, how shall you have your action against him without specialty?" (meaning a written instrument under his seal). And in Keilway, 78, pl. 5, S. C. 21 Hen. VII. 41, Frowicke, Ch. J., says: "If I covenant" (using covenant in the sense of an oral promise) "with a carpenter to build a house and pay him £20 to build the house by a certain day and he does not do it, I have a good action on the case by reason of the payment of the money; and without payment of the money in this case no remedy. And yet if he make the house in a bad manner, an action upon the case lies, and so for nonfeasance if the money be paid action upon the case lies." So also "Si un ferrier assume fur luv a curer non chival que est gravelled on ses paes * * * action sur le case gist fur cest matter sans allege ascum consideration, etc." 1 Rolle Abr. 10; S. P. 2 Hen. VII. 11. See further Hen. IV. 14; Martin, J., in 3 Hen. VI. 36b, 37a; 14 Hen. VI. 18b, pl. 58; 19 Hen. VI. 49a, pl. 5; 20 Hen. VI. 34a, pl. 1. The result was that the English courts of that day did not enforce a contract evidenced only by mutual promises — the "*consensual* contract" of the civil law. It will be noticed that the earlier authorities and those sustaining the rule "No action lies for a nonfeasance" pay no attention to the presence or absence of a consideration, *i. e.*, the existence of the reciprocal promises. And the distinction drawn between assumpsit and case does not affect our argument: for the point insisted upon is, that the old rule was: "No action shall be brought upon any special promise unless the testimony of witnesses is corroborated by proof of one of three overt acts of the party charged." These were his seal, his acting in according with the promise, or his acceptance of the consideration. (Holmes, in his Lectures on the Common Law, says (p. 264) "The rule was laid down; by parol the party is not obliged * * * from Edw. I. to Henry VII. we find no case where a debt was recovered,

Thus we can trace in municipal law the steps wherein rights and remedies were established; first, as to crimes, treated as acts of private war entitling the offended party to the recovery of a fine, next as affecting the state;[17] second, as to torts treated as *quasi*-crimes; third, as to civil torts proper; fourth, as to the completed contract of sale — the *nexum* of the civil law; fifth, as to partially executed contracts, the real contract of the civil law; and sixth, as to consensual contracts. For the proof of this historical development, see Maine's Ancient Law, Ch. IX.; Holmes' Common Law; 2 Pollock & Maitland's History of English Law, ch. V.

It follows that it is both the right and the duty of a government, not only according to precedent, but according to principle, and the true evolution of systems of law, to intervene to protect the rights of its citizens as against gross injustice whether the same results from a breach of international obligation arising out of a tort, or in the breach of international obligation arising out of a contract.

unless a consideration had in fact been received.") The protection this rule afforded against perjury was, that manufactured evidence of an overt act of the party himself can be met by direct disproof. This is so unless the alleged act is laid as having been done so long before that witnesses are dead, receipts lost, or a false interpretation can be put upon it without fear of a direct rebuttal. It is this exception that led to the Statute of Limitations.

The ancient rule was found so safe that a relaxation of its strictness was thought just, and finally prevailed in the time of Henry VII. This change consisted in allowing the mere proof of the existence of a consideration to be sufficient to corroborate witnesses, namely, in allowing proof of the existence of one oral promise to be a consideration for the enforcement of the other oral promise.

In view of the rule of common law that inadequacy of consideration did not affect the validity of the contract and the large gains without damage to the plaintiff resulting from obtaining damages on certain classes of these consensual contracts, notably on alleged oral contracts to pay the debts of another person, such perjury occurred, resulting finally in the passage of the Statute of Frauds. This statute prevented oral evidence wherein perjury was likely to be most advantageous to the suborners of perjury and most dangerous to the community. So, likewise, the later Statute of Limitations and Lord Tenderden's act covered other dangerous developments of perjury arising from the relaxation of the ancient rule above referred to.

[17] Stephens, History of the Criminal Law of England, 60; Stephens, General View of the Criminal Law of England, 8, 9; 1 Pollock and Maitland, History of English Law, 46; Saga of Nial, 10 Anglo-Saxon Classics, 96, 108, 181, 183, Chapters 37, 43, 71, and 72.

Accordingly, as in municipal law, we see the gradual evolution of the right of recovery, first, only as to crimes, treated as torts; then crimes proper, treated as offensés against the state; then as to civil torts; and next, as to contracts, through their varying complexity of *nexum,* real and consensual contracts; so may we in international law see a parallel evolution, from the enforcement of claims for private torts, through the enforcement of claims for breach of contract with a tortious element such as seizure of property, up to claims for pure breach of contract alone.

The matter standing thus on principle and practice, the astute lawyers of certain debtor nations, much disliking any interference with their autonomy by reason of the enforcement of such a principle in international law, early devised a clever way out of the wilderness. This is what is known as the Calvo clause.

This is a clause whereby in a government concession the concessionaire binds himself that in case of any dispute between the parties as to the validity or terms of the contract, the same shall — using the typical Venezuelan form —

be decided by the tribunals of Venezuela conformably to the laws of the Republic, and that such contract shall in no case afford a ground for an international reclamation.

This clause inserts the alleged rule of international law that resort for redress must first be had to the courts of the country as a contract stipulation between the parties, and adds a further express disclaimer of all right to obtain redress for any wrong by application to the country of the foreigner's citizenship.

The clause proved itself a difficult one to meet at first. The suspicion of its smartness, cleverness and ingenuity, more acute than sound in the first place, contemplating possible indefensible breaches of the contract on the part of the contracting government; and, in the second place, providing against any possibility of redress, crops out of its mere inspection. It bears a close analogy to the old conveyance brought before an English court in Elizabethan times. In that case the insolvent debtor, in conveying his property to a third party in order, in fact, to cheat his creditors, solemnly covenanted with said third party "*it is expressly stipulated and agreed that*

this deed is not made in fraud of my creditors." Short work was made of that clause by that sturdy old court. More successful in some of the earlier instances has been the Calvo clause.

The clause has been before arbitral tribunals with varying results, for which see the note.[18]

[18] In Day & Garrison *v.* Venezuela, No. 38, Mixed Commission, United States & Venezuela, 1885, where the clause provided for an arbitration, the arbitrators differed. Findlay, American, and Andrade, Venezuelan, holding the clause a bar, and John Little, American, holding that since the government repudiated the contract as invalid,

its action closed the door, therefore, to arbitration, and the failure to resort to that means of adjustment cannot, in my judgment, be rightfully set up as a defense here in its behalf. (4 Moore Int. Arb., 3564.)

In the case of the North and South American Construction Co. *v.* Chile, No. 7, United States & Chile Commission of 1892, the arbitrators held that Chile, having suppressed the tribunal provided for by the contract, the clause was no bar. (3 Moore Int. Arb., 2318.)

Again, in the bond claims of Woodruff and Flanagan, Bradley Clark & Co. *v.* Venezuela, Nos. 20 and 25, United States & Venezuela Arbitrations, 1885, the same commissioners, Findlay and Andrade, ruled that the clause was a bar to the claim. Judge Little indirectly expressed the true principle applicable to these circumstances, as follows:

Such language as is employed in Article 20 [the Calvo clause] contemplates the potential doing of that by the sovereign towards the foreign citizen for which an international reclamation may rightfully be made under ordinary circumstances, whenever that situation arises, that is, whenever a wrong occurs of such a character as to justify diplomatic interference, the government of the citizen at once becomes a party concerned. Its rights and obligations in the premises can not be affected by any precedent agreement to which it is not a party. Its obligation to protect its own citizen is inalienable. He, in my judgment, can no more contract against it then he can against municipal protection. (4 Moore Int. Arb., 3567.)

The case, having been dismissed, came again before the mixed commission, United States & Venezuela, 1903. The arbitrators having differed, the matter was left to the Umpire, Henri Barge. He held that since the claimants had not applied to the Venezuelan courts, the claim was not yet in a position to be passed on by an arbitral tribunal, and dismissed the case "without prejudice, on the merits." Mr. Barge further held with bland insouciance the following contradictory propositions: First, that no precedent agreement of its citizen could prevent a foreign government from making international reclamation in his behalf, and, secondly, that this did not prevent the citizen from being bound by his own agreement that he will never appeal to other judges than those he has agreed on. Thereupon, under conditions where the government of the citizen had disregarded the clause in the contract, and by international reclamation forced it to arbitration (by necessary implication to be held upon the merits because

So far as concerns the foreign offices of various powers, the Calvo clause has not met with much success.

The United States early took the ground that the existence of this clause did not preclude their diplomatic intervention in favor of the claimant in any case of denial of justice, using denial of

the protocol in question read that the decision should be made on the basis of "absolute equity"), the same learned jurist dismissed the claim without deciding it on the merits, and blandly asserted that this result is one which leaves "untouched the right of his government to make his case an object of international claim whenever it thinks proper so to do." (Venezuelan Arbitrations of 1903, Ralston's Report, 158–161.)

Query, how often must the government of the wronged citizen make his case an object of international reclamation before it may be passed upon on its merits by an international arbitrator?

Again, in the Rudloff case, the reclamation clause was before Mr. Barge, and he held its existence to be no bar to the claim and awarded damages. (Venezuelan Arbitrations, 1903, pp. 182, 183–200.)

But in the Orinoco Steamship Company's Case *v.* Venezuela, and again in the Turnbull Manoa Co. Limited, and Orinoco Co. Ltd. *v.* Venezuela, the same Mr. Barge held the clause an absolute bar, resulting, in the Orinoco case, in the dismissal of a damage claim of over a million dollars. (Venezuelan Arbitrations, 1903, pp. 90, 91, 244, 245.)

These contradictory decisions, absurdly reasoned, and resulting in mutually destructive conclusions, fit only for *opera bouffe*, would afford material for the gaiety of nations, were it not that the ripple of laughter dies on the lips when we consider the gross injustice thus perpetrated on private claimants. Decisions such as these have retarded the cause of international arbitration as a solvent for the disputes of nations beyond any possibility of computation. They deserve to be set in a special pillory of their own, so that international arbitrators shall know that however absolute their authority may be in the case in hand, there is a body of public opinion which will fearlessly criticize and condemn such absurd and despotic rulings, and so that at least the possibility of a just criticism shall have its full effect as a deterrent cause in preventing the repetition of such offenses.

But now to other and better reasoned precedents.

In the case of the Ciro and La Vela Railway and Improvement Company damages were allowed in spite of the existence of the clause. (Venezuelan Arbitration, 1903, 174.) So in the case of Virgilio del Genovese (Venezuelan Arbitrations, 1903, 174).

In the La Guira Electric Light & Power Company, Bainbridge, the American Commissioner, in an opinion concurred in by Paul, the Venezuelan Commissioner, speaks of the difference between a claim founded on a contract with some one else than the government, and says:

The case is very different from one in which the government itself has violated a contract to which it is a party. In such a case the jurisdiction of the

justice in its strict sense.[19] Later, however, without strict denial of justice in its limited sense, this government has repeatedly demanded and obtained international arbitration of claims where such a clause existed, and without requiring the claimant first to exhaust his remedies in the foreign court.

See all the American claims against Venezuela above cited, which thus involved the double question of

1st. Was there a rule of international law which required an arbitral tribunal to dismiss a claim where no recourse had been had to the court of the country?

2d. Was this alleged rule more binding when supported by a Calvo clause in the contract?

The later practice of the United States, Great Britain, Italy and

Commission under the terms of the protocol is beyond question. (Venezuelan Arbitrations, 1903, pp. 175–182.)

In Selwyn's case, Plumley, Umpire, held that the clause was no bar to the decision on the merits. (Venezuelan Arbitrations, 1903, 322–327.)

In Martin's case, Ralston, Umpire, held likewise, using this trenchant language:

Venezuela and Italy have agreed that there shall be substituted for national forums, which, with or without contract between the parties, may have had jurisdiction over the subject-matter, an international forum, to whose determination they fully agree to bow. To say now that this claim must be rejected for lack of jurisdiction in the mixed commission would be equivalent to claiming that not all Italian claims were referred to it, but only such Italian claims as have not been contracted about previously, and in this manner and to this extent only the protocol could be maintained. The umpire can not accept an interpretation that by indirection would change the plain language of the protocol under which he acts and cause him to reject claims legally well founded. (Venezuelan Arbitrations, 1903, 840–841.)

In the Delagoa Bay Railway Case, in which a contract contained a similar clause providing for an arbitration, Mr. Blaine, U. S. Secretary of State, claimed that Portugal, having broken the contract, could not hold the other party to the arbitration clause, and demanded an international arbitration. This having been had, the existence of the clause was held no bar, and the claimants recovered about $4,750,000. (U. S. Foreign Rel., 1900, p. 903; U. S. Foreign Rel., 1902, pp. 848–852; 2 Moore's Int. Arb., 1865–1899, as cited in 6 Moore's Dig. Int. Law, 728.)

Again, in the leading case known as El Triunfo Case, the arbitrators held the existence of the clause no bar to the claim. (U. S. Foreign Rel., 1902, pp. 838–880, especially pp. 839–871; 6 Moore's Dig. Int. Law, 732.)

[19] 6 Moore's Dig. Int. Law, 293.

Germany has been to repudiate (so far as concerns Latin-America) both the alleged rule of international law, and likewise the Calvo clause.[20]

In other words, where the contract is one to which the government itself is a party, and that government has committed the alleged breach, it is considered to be a futile thing for the private party to seek redress in the courts of that country. This conclusion is supported by the following reasoning. When the injustice alleged arises from breach of contract between the claimant and a foreign government which is itself a party to the contract, the right to intervene and enforce the claimant's right by international pressure is clear. For, in a case where the foreign government can not be sued upon the contract (as is the common-law rule), there is a clear right of diplomatic intervention in the absence of other remedy. And in the case where suit is allowed against the foreign government in its own courts, it is likely that such a remedy results in more apparent than real justice.

Hall says:

> When an injury or injustice is committed by the government itself, it is often idle to appeal to the courts; in such cases and in others in which the act of the government has been of a flagrant character the right naturally arises of immediately exacting reparation by such means as may be appropriate.[21]

While it is generally established by the practice of civilized nations, that a country will not intervene on a contract claim on behalf of one of its citizens against a citizen of a foreign government, such rule is predicated upon the fact that the country against whom the claim exists, will do equity in the case; and that is possible because the claim originally was between citizen and citizen, and in such a case the government could do equity as easily as it would in any other cause in which it was not personally interested, except to do justice.

But the case is varied when the claim, although it is of a contract nature, is not against the citizen but against the state itself, which

[20] 6 Moore's Dig. Int. Law, 300.

[21] Int. Law, 5th ed., 279.

thus becomes a party to its own suit, in its own tribunals, and, to a certain extent, judge of its own cause.[22] Especially is this situation accentuated when, as in the case of the Latin-American republics, the executive against whom the claim is alleged is a controlling influence in the government, and the legislative and judicial departments are but mere agents subservient to the executive will.

Aside from the foregoing considerations, the no-reclamation clause is void under well-recognized principles of municipal and international law.

The effective part of the clause is "and in no case can they become the foundation for international claims."

The parallel in municipal law to this covenant may be found in those stipulations made between contracting parties which are designed by the agreement of the parties to oust the jurisdiction of municipal courts.

It is settled in municipal law that a provision that all matters of dispute arising shall be arbitrated is not binding. The party to the contract may sue, and the merits of his case are investigated by the court, notwithstanding his breach of this covenant. The covenant is declared to be against public policy, since the courts are established for the purpose of determining these questions.[23]

It is declared that it is against the public policy of municipal law "to sanction contracts by which the protection which the law affords the individual citizens is renounced." [24]

The units of the municipal law are the individual citizens composing the state, and over them is established a central legal authority and court having the jurisdiction and power to decide disputes between them, and to enforce its decrees.

The units of international law consist of the sovereign individual states, and over these there is no established central authority and no court having jurisdiction of international disputes with

[22] Dr. James Brown Scott in Venezuelan papers sent to Senate, U. S., 1908.

[23] Haggart *v.* Morgan, 5 N. Y. 422, 55 Am. Dec. 350; Delaware & Hudson Canal Co. *v.* Pa. Coal Co., 50 N. Y. 250, 258; National Contracting Co. *v.* Hudson River Water Power Co., 170 N. Y. 439, 442; Hamilton *v.* Liverpool, etc., Ins. Co., 136 U. S. 254, 34 L. Ed. 419.

[24] Delaware & Hudson Canal Co. *v.* Pa. Coal Co., 50 N. Y. 250, 258.

the power to enforce its decrees. In lieu of such an established international forum there remains to remedy any international wrong the process of intervention by the state of the citizen wronged. This is done through the state applying by suggestion of good offices and intervention to obtain an arbitration; or, if that fails, by its intervention by war, to redress the injuries perpetrated by the foreign state upon its citizens.

In the question of whether such injuries shall be settled or waived, or in what court, and under what circumstances, and before what tribunal such claim shall be adjusted, the sovereign state, whose citizen has been injured, has an independent right to determine for itself the punishment to be meted out for the wrong, or the remedy which should be sought, independent of the rights of the citizen himself to such remedies. For a wrong done to a citizen of a state by foreigners in a foreign land is, under such circumstances, an insult and an indignity heaped upon the state to which such citizen belongs, and, as such, is resented as an insult or injury to the body politic itself.

The principle is as old as the imperial rule of the Romans, whose *Civis Romanus sum* was a passport and a safeguard throughout the world.

Both, then, because of this right in the body politic to remedy or avenge a wrong done to one of its members in its own way, and because the only proper forum for the settlement of international disputes is the international forum standing for these disputes in the same place as the municipal courts for the disputes of nationals, namely, international arbitration, any stipulation whereby a citizen of a sovereign state relinquishes the right of that state to procure for him, through the international forum aforesaid, a remedy on the merits for his wrongs, is absolutely void and contrary to public policy.

The Governments of Great Britain, United States and Germany have, in view of the foregoing considerations, consistently insisted that the no-reclamation clause in the Venezuelan contracts is of no validity.

So stood the theory and the practice as to forcible intervention to

enforce damages for breach of contracts made with a sovereignty prior to the last Hague Conference.

As is usual in such cases, the theories were in dispute, but the practice was a fact. And, as the last word of the cannon is more compelling, if not more convincing, than the last word of the pen, the Venezuelan bombardment of 1902 had, for the time being, squelched the opposing syllogism.

Scarcely, however, had the roar of the guns of the allied fleets reverberated along the Venezuelan shores when the pen again began, with steady flow of ink, to prove why these things ought not to be.

On December 29, 1902, Dr. Luis M. Drago, Minister for Foreign Affairs of Argentina, took occasion to write a note to the Argentine Minister at Washington, and so was launched the modification of the Calvo clause or doctrine, known as the Drago Doctrine — alleged rules of international law, as dear to the hearts of our South American brethren as the Monroe Doctrine to our own.

Briefly stated and distinguished, these doctrines are as follows:

Calvo denies the right to employ force in the pursuit of all claims of a pecuniary nature * * * on the grounds that the admission of such a principle of responsibility would establish an unjustifiable inequality between nationals and foreigners and would undermine the independence of weaker states. He does not even admit that the ordinary channels of diplomacy are open to claimants in such cases.[25]

On the other hand " Señor Drago merely denounces armed intervention as a legitimate or lawful means of collecting public debts." [26]

Both the Calvo and Drago Doctrines, in ultimate analysis, are based on the axiom of international law "All sovereignties are free and equal." Being so in legal fiction, any interference of one nation with another on grounds disputed between them is not an act of justice, but an act of might — the strong against the weak — might, not right, ruling the case. Such act is contrary to justice, ergo, there can be in the eye of international law no lawful intervention by force of one nation against another to enforce such claims.

[25] Hershey on the Calvo and Drago Doctrines, 1 Am. Journal of Int. Law, 31.
[26] *Ibid.*

All other arguments used to prove the inexpediency of resorting to force as between nations to compel justice in such cases, are mere considerations of expediency, and not of right. In addition, they apply with almost equal force to all other classes of claims of private citizens of one nation against another, and if given conclusive weight would result in preventing reclamation in cases in which it is now recognized as entirely proper.

In other words, their arguments of expediency prove too much. They would, if always given full weight, make poltroons and cowards of us all, while in fact they are considerations of policy, not of justice — and justice is the all important goal.

Again, the axiom that all nations are free and equal — what a misleading one it is! Nations may be free, but not so free as to act with injustice towards other nations, or their citizens. And nations are not equal in the sense that they are equal in honesty, equal in integrity and equal in a sense of justice, any more than they are equal in wealth, or in numbers, or in power.

The Spanish proverb says that "*Men are as good as God made them, some a good deal worse,*" and so likewise with nations. What fools we mortals be if in the face of the fact we allowed ourselves to be beguiled by the fiction.

It follows, then, that, in principle, both the Calvo and the Drago Doctrines are a mere play on words, a rattling of counters, not an argument on things as they are. And this is all the more true because of the primitive condition of the world so far as concerns the relations of the nations in it, even in this late year of Grace, 1910. Not now, if ever in the millenium, have we a parliament of the world, and courts, and police of the world.

Each nation stands toward another without these modern appliances of civilization, more lonely, more unprotected, more dependent alone upon its own might and power for its existence and continuance (save only for the sympathy and altruism that centuries of dwelling under conditions of municipal law have developed in individuals) than the man of the Stone Age. For he had a family and a tribe to aid and succor him, while the nation stands alone, like a rogue elephant in its conflict with another.

A decade which has seen the Russian and Japanese treatment of China and Korea and Manchuria, has seen the Russo-Japanese War and its causes and effects, has seen the later observance, or lack of observance, of treaties in regard to the open door and other matters in Korea and Manchuria, has been dependencies of Turkey become provinces of Austria-Hungary, can hardly need further object lessons to bring this unpleasant, ugly truth home to its observers.

In the absence, then, of courts having jurisdiction over nations as municipal courts have jurisdiction over individuals, and on the refusal of a nation to redress a wrong, no recourse save force, save war, remains to the nation whose citizen is alleged to have been injured. For to allow mere *ipse dixit* of the alleged offending nation to the effect that no wrong has been done to conclude the matter, is to condemn the private claimant without a trial, and to make the accused nation a judge of its own case.

Nor is the case much improved by the suggestion that the claimant must seek redress in the domestic courts of the nation accused. All our knowledge of men and things, our local knowledge, cries out against the hyprocrisy of such an argument. What meed of justice do our city men get in the country courts against the farmers, or *vice versa,* and our United States Circuit Courts in the various States, so far as their jurisdiction is dependent on diverse citizenship ousting the State courts, is a constitutional recognition by our forefathers of facts as they are, not as they exist in theory, even as respects justice between the citizens of the various States, parts of our Union.

It follows, then, that the right, in the last analysis, to the exercise of force to compel restitution on contract claims in international law is supported by fundamental reasons of justice and of public policy.

On principle, the meaning and scope of the maxim *ubi jus ibi remedium* should be the same in both the municipal and international law.

Is it possible, then, that we must follow up such claims in every case by war?

The answer is " No." The argument leads to no such conclusion.

It is based on the absence of a proper court to try the case, and on the necessity of seeking some other redress. But the proper court to try such a case is an arbitral tribunal. Hence, to such a tribunal should such a case go for decision, for otherwise the strong would, without trial, compel the weak to do its bidding.

On principle, then, the right to the use of force is limited by the necessity of first offering an international arbitration and abiding by its decree if one is had. And this principle has now become substantially a part of the law of nations both in theory and in practice. The Venezuelan bombardment and the Drago note brought the issue squarely before the nations.

At the third Pan-American Conference in 1906, Mr. Root, while strongly supporting the proposition that contractual claims should not be collected by force, suggested that it would not be proper for the debtor nations there assembled to give utterance to a rule, but that the better course would be to request the coming Hague Conference, where both creditor and debtor nations would be assembled, to consider the subject. Accordingly, a resolution was passed recommending that the Hague Conference

consider the question of the compulsory collection of public debts, and, in general, means tending to diminish between nations conflicts having an exclusively pecuniary origin.[27]

In the second Hague Conference held in 1907, the United States of America presented a proposal

for the limitation of the employment of force in the recovery of ordinary public debts having their origin in contract.[28]

The proposal as at first made provided that in order to prevent conflicts arising over such matters and

to guarantee that all contractual debts of this nature which shall not have been settled peaceably through the diplomatic channels shall be submitted to arbitration, it is agreed that a recourse to no measures of coercion involving the employment of military or naval force * * * shall take place until an offer of arbitration has been

[27] 1 Scott Hague Conferences, 399.

[28] *Ibid*, 400.

made by the creditor, and refused, or left without response by the debtor, or until the arbitration has taken place and the debtor state has failed to conform to the sentence rendered. * * *[29]

The discussion which followed the introduction of this proposal was illuminating and can be found ably summarized in the interesting pages of Dr. Scott's *Hague Conferences.* General Horace Porter made an able speech in support of the American proposal. Dr. Drago for the Argentine Republic accepted the arbitration part of it, while reserving from its operation the public debts involved in the Drago Doctrine as distinguished from the Calvo Doctrine. Brazil, through M. Barbosa, proposed to amend so as to declare against a war of conquest.[30]

Venezuela voted for the renunciation of force, but would not bind itself to arbitrate.[31]

Great Britain, Germany, France, and Austria-Hungary, accepted the proposition without reservation. Italy, Spain and Japan reserved their vote. Russia seconded the proposal but limited it to future obligations.[32]

Sweden objected on the ground that the proposal gave direct sanction for war if there were no consent to arbitration.

Roumania and Belgium called attention to the fact that the proposition called for compulsory arbitration of contract claims and contained no reservations. They abstained from voting.

Switzerland opposed the proposition as derogatory to her courts.

At the end of this discussion in the first commission July 27, 1907, the American proposition was approved by a vote of thirty-six votes, none against and eight abstentions (Belgium, Greece, Luxemburg, Roumania, Sweden, Switzerland, Turkey and Venezuela).[33]

Thereafter the draft was revised to meet criticisms, especially that of Sweden, that it recognized the right to use force in case of refusal to arbitrate, in such a way that the first paragraph should

[29] *Ibid,* 400.
[30] *Ibid,* 412.
[31] *Ibid,* 412.
[32] *Ibid,* 413.
[33] 1 Scott Hague Conferences, 415.

merely renounce the right to use force and the second provide that the debtor state by refusal to arbitrate should lose the benefit of the renunciation.[34]

The important clauses were then passed in the following form:

The contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals.

This undertaking is, however, not applicable when the debtor state refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, or, after the arbitration, fails to submit to the award.[35]

The final vote was thirty-nine in favor, none against, five abstentions (Belgium, Roumania, Sweden, Switzerland and Venezuela). There were, however, various objections in the form of reservations.[36]

Then Argentine made the following two reservations: First, so far as concerned ordinary contract debts between citizens and the foreign government, resort should be had to arbitration only in specific case of denial of justice after recourse to local courts. Second, public loans cannot in any case give rise to military aggression. The first reservation restored most of the Calvo clause and doctrine. The second makes the convention nugatory as to claims on public loans.

The Peruvian reservation preserved the Calvo clause.[37]

By reason of the guarded language of the proposal as finally adopted, Dr. James Brown Scott says that the result of these proceedings at the Hague Conference is to leave the international law on the subject just as it was before.[38]

This conclusion is sustained by the following reasoning: the first clause forbids force, the second provides that the debtor nation shall have no right to insist on the benefit of the renunciation in the first clause, if it has refused to arbitrate, etc. Consequently, where

[34] *Ibid*, 415.

[35] 2 Scott Hague Conferences, 357; 1 *ibid*, 415.

[36] 1 Scott Hague Conferences, 416–417; 2 Scott Hague Conferences, 532, 534.

[37] 1 *ibid*, 417.

[38] Scott's Hague Conferences, 415.

arbitration is refused, both clauses become *functus officio,* the convention does not apply, and we must seek for light in the former condition of the law.

With all due deference to so high an authority and to the argument presented, this statement as to the net result of the Hague Convention on this subject appears not to be entirely accurate. The fairer construction appears to be as follows:

The convention, as a writing, must be construed as a whole as it stands in final form. The nations had disputed among themselves as to whether it was a just doctrine that force should be used to enforce a contract claim of the national of one government against another government. They met in solemn conclave to agree on a decision of this question which should furnish a just rule of law for their future guidance. Under such circumstances they agree not to have recourse to force to recover on contract debts. Then is added a clause that this undertaking is not applicable when the debtor state refuses, etc., arbitration.

The implication is obvious that since the covenant not to use force is inapplicable when the debtor state has refused arbitration, etc., the right to use force under the conditions stated is impliedly assented to.[39]

In any event, and without regard to any metaphysical discussion of the precise language used in this convention, the fact that the great nations, Great Britain, Germany, Italy, France, Russia, and perhaps the United States of America, are committed to the right to use force when arbitration is refused, and since their conclusions in that regard are shown to be founded on true principle and true justice, we may take it for granted that the doctrines of Calvo and of Drago are now as dead as Dickens says Old Marlor was — that is, *" dead as a door nail."*

The CHAIRMAN. The discussion of this subject will be continued by a paper to be read by Mr. C. L. Bouvé, of Washington.

[39] Up to date this Convention, which was subject to ratification by the several governments, has been ratified by only the United States of America (2 Scott's Hague Conferences, 361). It stands, however, as the formal expression of opinion of a congress of eminent jurists as to what the principle of international law should be.

ADDRESS OF MR. C. L. BOUVÉ, OF WASHINGTON, D. C.,

ON

Intervention for Breach of Contract or Tort Where the Contract is Broken by the State or the Tort Committed by the Government or Governmental Agency.

This article deals with intervention by this government on behalf of its citizens resident abroad for injuries suffered by them in consequence of a breach of contract or a tort when the contract is broken by the foreign state, or the tort committed by the government or governmental agency.

It is proposed merely to touch upon the rights and obligations of the United States with regard to the protection of its citizens resident abroad from three standpoints only: that of the Hague Peace Conference of 1907, that of the precepts of international law as expressed in the works of recognized authorities on the subject, and finally that of the national policy adopted by the United States in this regard. This discussion will furthermore be limited in a general way to cases originating in contract, assuming that as to those arising purely in tort this country has very generally exercised its unquestioned right of intervention.

The object of the convention entered into at The Hague respecting the limitation of the employment of force for the recovery of contract debts is, as its preamble states, to avoid "between nations armed conflicts of a pecuniary origin arising from contract debts which are claimed from the government of one country by the government of another country as due to its nationals."[1] The first and second articles of this convention read as follows:

ARTICLE 1.

The contracting powers agree not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals.

This undertaking is, however, not applicable when the debtor state

[1] Scott: The Hague Peace Conferences of 1899 and 1907, Vol. II, p. 357.

refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, pervents any *compromis* from being agreed on, or, after the arbitration, fails to submit to the award.

ARTICLE 2.

It is further agreed that the arbitration mentioned in paragraph 2 of the foregoing article shall be subject to the procedure laid down in Part IV, Chapter III, of the Hague convention for the pacific settlement of international disputes. The award shall determine, except where otherwise agreed between the parties, the validity of the claim, the amount of the debt, and the time and mode of payment.[2]

Mr. Crammond Kennedy, in his address delivered before this Society on April 19, 1907, and duly published in its proceedings,[3] dealing with the question "Is the forcible collection of contract debts in the interest of international justice and peace?" said, with reference to the enforcement of pecuniary obligations between nations:

* * * when the amount or the equity of the obligation is in doubt, and impartial arbitration is proposed by the debtor government it should be accepted by the creditor.

The learned author adds in the note which he subjoins:

This may now be said to be substantially the international law on the subject, in view of the convention adopted at The Hague to the effect that contractual debts shall not be collected by force unless impartial arbitration, proffered by the claimant government, is either declined, or unreasonably delayed, or the awards of the arbitrators are left unsatisfied, by the debtor government.

It would seem that far from denying the right of nations to employ armed force for the purpose of enforcing the fulfillment of contractual obligations, the terms of the convention tacitly admit the existence of such an international right, but limit its exercise under the conditions specified. They merely make it incumbent on the demandant sovereign to propose arbitration to the debtor state,

[2] *Ibid*, p. 357.

[3] Proceedings of the American Society of International Law, held at Washington, D. C., April 19 and 20, 1907, p. 121.

leaving open to the former those remedies of which it may avail itself in the exercise of a national or international policy in case the debtor fails to meet the offer, or after accepting the same, hinders such further action as should naturally be consequent thereon, or fails to submit to the award.

Assuming in a given case that the debtor state places itself outside the protection afforded by the terms of the convention, what shall form the basis of diplomatic intervention by the demandant state? It can not consist in the mere failure of the recalcitrant state to arbitrate on the ground that such failure constitutes a breach of international good faith, for it is to be noted that the high contracting parties do not bind themselves to arbitrate. It would seem otherwise when the debtor state, after accepting the offer, prevents any *compromis* from being agreed upon, or fails to submit to the award after the decision is rendered; for such acts might well be deemed devoid of the mutual good faith indispensable to the friendly and profitable intercourse of nations, and draw down upon the delinquent state the consequences which the convention was framed to avoid. In view of the fact then, that mere failure to arbitrate can not be held a violation of the terms of a convention which do not make arbitration obligatory on the parties to the undertaking, and in view of the further fact that such failure does not as yet, at least, constitute a breach of the accepted rules of international conduct, it would seem that intervention on the part of the state demandant must in such case still depend for its justification on the familiar governing principles of international law or on the precedents established by an accepted national policy. For this reason a brief consideration of both law and policy is thought not out of place in this connection.

Vattel, after pointing out the duty and obligation on the part of the state to preserve itself, continues:

If a nation is under the obligation of preserving itself, it is no less under that of preserving most carefully all of its members. It owes it to itself; for to lose any one of its members, is to weaken itself and do violence to its own self-preservation.[4]

[4] Le Droit des Gens, book 1, Chap. 2, Sec. 17.

But all purposes of self-preservation on the part of a state are not served by merely protecting the life of the citizen or subject; the protection of his property as well as his life tends toward and is a necessary element of the self-preservation of the state.

Property even of private persons in their totality must be regarded as the property of the nation from the point of view of other states. It actually belongs to it in a certain sense because of the rights which it has over the property of its citizen, because it is a part of the collective wealth of the state and increases its power. It is of interest to the state on acount of the protection which the latter owes its members.[5]

It is thus evident that the source of the protection extended by a state to its citizens is the obligation on the part of the state to preserve itself; and that the protection granted for this purpose extends, not only to the life and physical welfare of the subject or citizen, but to his property as well. It would seem that the state is bound to protect him as long as the relationship between sovereign and citizen exists.

The citizen or subject of a state who absents himself for a time without the intention of abandoning the society of which he is a member does not lose his quality by his absence; he preserves his rights and remains bound by the same obligations.[6]

The fact that the assumption of rights and obligations incident to foreign residents does not affect those incident to citizenship once conceded, it follows that the right of a state to protect its citizens resident abroad is identical with the right to protect them as citizens at home; and being identical, must be based on the same source — that of self-preservation of the state. This idea is inferentially conveyed by Hall when he deals with the subject of protection of citizens abroad under the chapter entitled "Self-Preservation."[7]

Inasmuch as the foundation of the right to protect citizens abroad would seem to be the self-preservation of the protecting state it would

[5] *Ibid*, Chap. 2, Sec. 81.
[6] Le Droit des Gens, book 2, Chap. 8, Sec. 107.
[7] Hall, Int. Law, p. 291, Sec. 87.

appear to follow that *any* act of a foreign state injurious to the life, liberty, or property of citizens abroad justifies intervention of some kind on the ground given. Aside from the question of policy, such a broad exercise of the right is restricted within certain limits to a generally accepted rule of international conduct governing the subject. The measure of that restriction is necessarily limited, however, to a fair application of the municipal laws of the foreign country, provided, of course, that those laws meet the standard of modern civilization; for, as it is the duty of every sovereign state when it once unconditionally admits strangers within its borders, to apply its local laws fairly as to them, it can demand the same from any foreign country by whom free and unconditional access to its own nationals is granted.[8]

The rule of international law above referred to and limited in its application to cases where the injury is the result of the act of the sovereign or its duly constituted authorities may be briefly stated as follows:

A state may intervene for the protection of its citizens abroad for injuries received to life, health, liberty, or property by the act of a foreign government, or its duly appointed authorities, where the injury constitutes a violation of the municipal law or is the result of a refusal to apply it with fairness, and where the interests of the state call for protection of individual rights on the ground of self-preservation.

The principles governing intervention when the wrongful act is committed by the sovereign or his duly constituted authorities differ from those applicable where the tort is the act of a private individual in this, that whereas in the second instance the country whose citizen is injured is bound to assume that the injured party will be able to obtain ample redress in the local courts and is therefore not justified in intervening until failure to punish the offender, or other acts amounting to a denial of justice show to the satisfaction of the claimant state that it is not the intention of the offending government to exercise that impartiality in the administration of its laws

[8] Vattel, *ibid*, book 2, Chap. 8, Sec. 104; Pradier-Fodéré, Traité de Droit Int. Pub., Vol. 1, p. 349, Sec. 204; Hall, Int. Law, 4th ed., Chap. 7, Sec. 87, p. 291.

which the law of nations demands, in the first instance the unlawful and tortious act by the state itself or by its authorities, if not disavowed by the state, amounts to an admission that the sovereign does not consider itself bound by its own municipal law, and thus justified immediate intervention on the part of the offended state. It is obvious in the last case mentioned that an offer on the part of the offending government to submit the matter to the decisions of its own tribunals on the ground that local remedies must be exhausted before diplomatic intervention on behalf of the claimant can be properly exercised by the latter's government, calls for no consideration.

When an injury or injustice is committed by the government itself it is often idle to appeal to the courts. In such cases, and in others in which the act of the government has been of a flagrant character, the right naturally arises of immediately exacting reparation by such means as may be appropriate.[9]

Equally good cause for intervention exists

when the foreign government becomes itself a party to important contracts and then not only fails to fulfill them, but capriciously annuls them, to the great loss of those who have invested their time and labor and capital from a reliance upon its own good faith and justice.[10]

As it is the duty of the foreign sovereign to protect resident citizens of other states in all their rights to the extent of the protection afforded by the local municipal law and to extend to them all the rights and remedies which the local courts can grant where questions arise between them and its own citizens or subjects, so is it itself barred from the exercise of any act the effect of which is to deprive them of such redress as its courts have to offer. This rule has perhaps never been stated more clearly or impressively than in the opinion rendered by Sir Henry Strong, one of the arbitrators in *El Triunfo* case. He says:

[9] Hall, Int. Law, 4th ed., Sec. 87, p. 291.

[10] Mr. Cass, Secretary of State, Wharton's Int. Law Dig., Sec. 232, p. 661.

If the Republic of Salvador, a party to the contract which involved the franchise to El Triunfo Company, had just grounds for its complaint that under its organic law the grantees had by misuser or nonuser of the franchise granted, brought upon themselves the penalty of forfeiture of their rights under it, then the course of that government should have been to have itself appealed to the courts against the company, and there by the judicial proceedings, involving notice, full opportunity to be heard, consideration, and solemn judgment, have invoked and secured the remedy sought.

It is abhorrent to the sense of justice to say that one party to a contract, whether such party be a private individual, a monarch, or a government of any kind, may arbitrarily, without hearing and without impartial procedure of any sort, arrogate the right to condemn the other party to the contract, to pass judgment upon him and his acts, and to impose on him the extreme penalty of forfeiture of all his rights under it, including his property and his investment of capital made on the faith of that contract.

The fact that a state occasionally refuses to interfere in such cases is not due to the absence of the right to protect, but to the fact that as a sovereign state it is the sole judge as to whether or not the injuries complained of actually or indirectly, through a reasonable extension of the theory, menace its self-preservation. Futhermore, intervention, or the denial of it, must necessarily be based on a general national policy or a particular policy adopted for the purpose of meeting the requirements of each particular case. This brings us to the consideration of the national policy of the United States with regard to the protection of its citizens abroad.

While it would seem, under the theory of national preservation here advanced, that the United States has the right to protect its citizens abroad in cases of breach of contract by the foreign power this government has almost uniformly refused to intervene at least by the use of means other than that of its good offices;[11] and even the good offices will be refused in cases where it appears that the origin of the debt was a speculative or unneutral transaction.[12] Various grounds justifying the refusal of the government have been expressed

[11] Mr. Fish, Secretary of State, to Mr. Muller, 1871, Moore, Int. Law Dig., Vol. 6, p. 710.

[12] Mr. Seward, Secretary of State, 1868, Moore, *ibid*, 710.

by successive Secretaries of State, but the argument most frequently advanced in support of this policy is that contractual relations entered into by a citizen of this country and a foreign government are the result of the voluntary action of the parties; moreover that a party before entering into a contractual relation with another is presumed to take the character of the other into consideration, and if that character is such as to bring into the transaction a separate element of risk, to voluntarily assume it.[13] Mr. Bayard, when Secretary of State, has gone so far as to assert that by the law of nations there is no redress for contractual claims.[14] It would seem safer, however, to base the refusal of intervention in such cases on an accepted national policy rather than on the absence of right on the part of the state to protect as a matter of international law.[15] That as a matter of national policy the rule of non-intervention in claims purely contractual can be sustained for another reason besides that of voluntary assumption of risk for individual profit on the part of the claimant, namely, that of absence of bad faith on the part of the foreign nation, seems plain. The commission of a tort, the intentional violation of a municipal law by an individual or state conveys irresistibly the idea of a conscious and deliberate wrongful act, which in turn equally irresistibly implies the existence of bad faith as the instigator of the injury. It is otherwise in the case of failure on the part of either state or individual to carry out a contract or even to deliberately withdraw therefrom. Such want

[13] Mr. J. Q. Adams, Secretary of State, 1823, Moore, *ibid*, 708; Mr. Bayard, Secretary of State, 1885, Moore, *ibid*, 716; Mr. Blaine, Secretary of State, 1890, Moore, *ibid*, 717.

[14] Mr. Bayard, Secretary of State, to Mr. Bispham, 1885, Moore, *ibid*, 716. It is evident from the contents of a later dispatch from Mr. Bayard to Mr. Scott of June 23, 1887, cited in Moore, *ibid*, 725, that the claims referred to are purely contractual and based on no injected element of tort.

[15] In view of Lord Palmerston's circular of 1848, addressed to the British representatives in foreign states, to the effect that it is not a question of international right whether or not the British Government should make the claims of British holders of unpaid bonds and public securities of foreign states the subject of diplomatic negotiations, which was reaffirmed by Lord Salisbury as late as 1880, it would seem that Mr. Bayard's contention is open to challenge. (See Hall, *ibid*, Sec. 87, p. 294.)

of action or such withdrawal may be and generally is the result of the failure or supposed failure by the other party to carry out his terms as agreed upon, and gives rise to no fair inference of the existence of that moral turpitude which is characteristic of bad faith.

This reasoning does not, however, apply to cases where, although the transaction leading to the claim originates in contract, the immediate cause of the claim is an act by the foreign government injurious to the contractual interests of the claimant, and not in itself arising in contract. In such cases it is the policy of the United States to intervene, the basis for diplomatic action being generally stated to be the tort committed by the foreign government.

Mr. Bayard, in an instruction issued in 1887, says:

I observe * * * that in part of your note to Dr. Seijas you speak of the case as one of violation of contract, though you subsequently very properly rest the claim on tort. The case is indeed one of violation of contract, but it is not on the contract, for the purpose of obtaining either its fulfilment or damages for its non-fulfilment that this government now proceeds. The case is one of an arbitrary confiscation and spoliation of the rights and property of citizens of the United States * * *"[16]

It appears that this policy is amply justified by the rule of international law which allows intervention where a state violates its own municipal law to the detriment of resident citizens of a sister state; but this country's policy of non-intervention in simple breaches of contract shows that, in such instances at least, it does not avail itself of the right of intervention admitted under that particular rule. Intervention in cases of confiscatory breaches of contract would not seem to be based on the financial loss suffered by the individual, for no matter what the extent of the private loss, if it arises from a simple breach of contract, this country will not generally interfere; nor on the tort in so far as it affects the individual only, for the individual loss actually suffered remains the same irrespective of whether the act that causes it is tortious, or the reverse.

[16] Moore, *ibid*, 725. *Semble*, Mr. Olney, Secretary of State, to Mr. Gana, Chilean Minister, 1895. Moore, *ibid*, p. 729. See also Mr. Cass, Secretary of State, 1858, Moore, *ibid*, p. 723; Mr. Bayard, Secretary of State, 1887, Moore, *ibid*, p. 725.

Relying on Vattel's principle that he who ill-treats a citizen indirectly offends the state,[17] it seems safe to conclude that the true justification of intervention and its proximate cause in such cases is bad faith on the part of the debtor sovereign directed, not towards the citizen, though traced through him, but towards the state.

It may be added in this connection that although it is the coexistence of the tort with the right to protect that is taken as the ground of intervention in the particular case, the right to protect, based as it is on the national right of self-preservation, *may* be exercised in the absence of any indication of bad faith on the part of the foreign state. For it must be remembered that the failure to exercise it in cases arising in contract is due merely to the existence of a given policy, and not to the absence of the right to protect. Where special circumstances demand it[18] the policy must yield to the necessities of the case; in other words, when the national interest demands it, it seems that the right to protect should be exercised on the ground of self-preservation alone, irrespective of good or bad faith on the part of the foreign sovereign.

This paper, necessarily limited though it is, calls for a brief consideration of the policy of this country regarding the protection of the rights of those of its citizens whose interests as members of a foreign corporation are subjected to injury by tortious acts performed by the incorporating state. In two late cases of importance, that of the Delagoa Bay Company (1889), and that of El Triunfo Company (1898), this government decided that the proper

[17] Vattel, Le Droit des Gens, book 2, Chap. 6, Sec. 71.

[18] It is not known whether or not this proposition has ever been directly announced by this government, but the following statement would seem in point: After stating that the United States will intervene to protect its citizens in Nicaragua for injuries resulting from tortious proceedings, Mr. Cass, Secretary of State, in instructions sent to Mr. Lamar in 1858, said: "But there is yet another consideration which calls for the attention of this government. These contracts with their citizens have a national importance. They affect not ordinary interests, merely, but questions of great value, political, commercial and social, and the United States are fully justified by the considerations already adverted to in taking care that they are not wantonly violated, and the safe establishment of an inter-oceanic communication put to hazard, or indefinitely postponed. * * *" (Moore, *ibid*, 723.)

course was diplomatic intervention. There is an inclination to criticise this action, mainly on the ground that as the claimants were stockholders in a foreign corporation they must look to the corporation for redress in the first instance, being themselves possessed of merely equitable rights, and that as the corporation was a foreign citizen the United States were not justified in taking international action, inasmuch as such action, if taken at all, must be taken on behalf of citizens of the United States.[19]

The question presented by such cases, put concretely, would seem to be "Has this government the right to intervene on behalf of those of its citizens who, through a tortious act on the part of a foreign government, are injured in their equitable, though not in their legal, rights under the municipal law?" Inasmuch as the right to protect at all seems based on the right of national self-preservation it follows that, with the limitations hereinbefore set out, the exercise of the right is justifiable whenever it constitutes directly or indirectly an act of self-preservation. Where the limitations imposed by international law or voluntarily assumed as a matter of national policy are no longer binding, it would appear that there are but two things for the state to consider, first, whether there is any specific right to be protected, and, second, whether the protection of that right is necessary, directly or indirectly, as a measure of national self-preservation. Of this necessity the state must, perforce, be its own judge.

It seems that the question of equitable or legal right — creatures par excellence of the municipal law — should have no standing

[19] In the case of the *Antioquia*, cited by El Salvador in El Triunfo case, the following grounds against intervention are stated by Mr. Frelinghuysen, Secretary of State, citing the case of the Banco Nacional del Peru: "* * * that the existing interest of the American shareholders was reduced to an equitable right to their distributive shares of the funds of the corporation; that the rights of the corporation were involved and not the individual rights of the shareholders, and that even if all the individual members of the corporation were duly qualified American citizens they could not present their complaint in their individual names as owners, but must present them as belonging to the corporation as owner." (Moore, *ibid*, p. 646.) This reasoning was characterized by Judge Penfield, then Solicitor for the Department of State, in his report to Secretary Hay, as academic. (Moore, *ibid*, p. 651.)

where matters essentially of international law are concerned. For while the sovereign may and should recognize the distinction between such rights under the local municipal law, such recognition would seem to be necessary only for the purpose of ascertaining whether or not the right the protection of which is under consideration constitutes such a national asset as to justify intervention from the standpoint of national self-preservation. To make intervention depend on the equitable or legal nature of the right to be protected would seem to force upon international law a distinction which it should not admit, and to compel the law of nations to pay homage to the laws of a single nation. As it is the injury to the state and not the injury to the individual which is the true cause and justification of international intervention, it seems unreasonable to contend that the remedies open to sovereigns must be founded on or measured by limitations imposed by municipal law. It seems that equitable rights exist as such under municipal law in default of adequate provision under the legal system for the protection of certain rights which, in justice, demand such protection; that is, that equitable rights are called into existence because the rules of relief provided by the municipal law are inadequate in equity. Does this disability exist with regard to the rules for relief provided by international law? In other words, is there any right of any kind which, within the limitations already set out, the state may *not* protect under the rule that intervention is justifiable when the demandant state is satisfied that the violation or distruction of such a right by the debtor state menaces its self-preservation? The writer has yet to discover an instance of such an exception among the accepted rules of international law. Should such an exception gain a firm foothold in the exercise of our national policy? It would seem not, according to that policy as hitherto pursued and by which this government seems to say to its citizens abroad: "You shall be protected even in rights originating in contract where the violation of those rights is the result of a breach of good faith on the part of a foreign state." International law says: "Protection in all rights." Surely it seems unreasonable that a national policy should create exceptions for which there is no precedent in international law which is the very foundation of the policy.

It would seem that the true answer to the objections to the exercise of intervention in such cases is that by the tortious act of a foreign government a citizen of the United States has been deprived of or injured with respect to a property right; that this right has a financial value which may be great or small; that the fact that the right is legal or equitable has no significance from the point of view of international law, which seems to recognize no such distinction; that the equitable nature of the right does not detract from its value as an asset belonging to the citizen, or prevent it from forming a portion of the totality of the assets of the state; that as such, its existence may or may not be necessary to the preservation of the state, but of that fact the state must be the only judge; and if the sovereign reaches the conclusion that it is so necessary, it is justified in intervening to protect itself through the protection of that particular right.

The following conclusions are the result of the foregoing reasoning:

First, that the convention at The Hague in 1907 respecting the limitation of the employment of force for the recovery of contract debts neither curtails nor denies the right of nations to intervene diplomatically for the enforcement of such debts, but merely makes it a condition precedent on the part of the demandant state to invite arbitration with the debtor state prior to the exercise of the right, if exercised at all; further, that by failure to submit to an award rendered or by preventing an agreement as to a *compromis,* after accepting the offer to arbitrate, the recalcitrant state *may* lay itself open to intervention by the demandant on the ground of breach of national good faith in the premises aside from the grounds of intervention generally recognized as valid in international law, whereas a mere refusal to arbitrate would seem to render the debtor state liable to intervention on the latter grounds.

Second, that the United States has the right, under the accepted principles of international law, to interfere for the protection of its citizens abroad in *all* cases where the foreign sovereign commits or suffers to be committed, an act in violation of its own municipal law, whereby citizens of the United States are injured in person or property, irrespective of whether such injuries are purely contractual in nature, or are the result of a tort.

Third, the United States, under its present national policy, will generally refuse to intervene for the protection of the property rights of its citizens abroad, where such injury arises from a mere breach of contract on the part of the foreign government, and is not characterized by bad faith toward the United States; where, however, such breach is characterized by bad faith, as evidenced by the injection into the transaction of an element of tort, the United States will intervene (in the absence of any conflicting subsidiary policy), the recognized ground of intervention being the tort. Furthermore, intervention in such cases will not, it seems, be refused on the ground that the citizen, protection for whose rights is requested, is a member of a foreign corporation such as a joint stock company or commercial copartnership recognized as a juridical entity by the incorporating state.

The CHAIRMAN. There is now an opportunity for discussion of the papers presented this morning and this afternoon, and I presume also for a discussion upon the general subject of *The Basis of Protection to Citizens Residing Abroad.*

Mr. MARBURG. I would like to express just one thought in connection with this subject which has been discussed, considering the question as naturally falling back upon the conditions of the municipal law, and the phases of the law dealing with this question.

It seems to me that the governing principle by which a debtor is haled into court to meet a certain obligation which he may have to a creditor is expediency, and not justice. The average commercial house takes into consideration its average annual losses and they are charged up as part of the expenses of the business. There is no question of justice in connection with the process of the law against the debtor.

In respect to the use of force in collecting contractual debts of a citizen against a foreign nation, if you will look upon this from the side of expediency there at once arises the tremendous consequences of the use of force. War is no light matter, and the consequences of a single war may many times outweigh the benefits that can be derived from such a process.

Formerly men were thrown into prison for debts, whether they had property with which to discharge that debt or not. It seems to me that just as that custom has been thrown aside, we shall come to this higher position, that the use of force in collecting claims arising out of contracts abroad is a thing which should be relegated to the limbo of things which we have outgrown.

The CHAIRMAN. Is there any further discussion of this subject?

Mr. BOUVÉ. Mr. Chairman: I would like to ask the gentleman who has just spoken, if it is his opinion that an American citizen may be wrongfully ruined by a foreign government, without having any method of redress afforded him. I can not quite understand his point of view. He appears to take the ground that it is wrongful and inexpedient to apply force for the purpose of relieving a man who has been ruined in the way I have just suggested. It may be that I have mistaken his meaning; but I am of the opinion, from what I have heard, that he thinks no relief ought to be given under those circumstances. If he does not mean that, I would like to hear what he has to say with regard to the kind of relief to be given. For example, let us suppose that an offer of arbitration has been made, under the terms of the first article of the Hague Convention of 1907, and the debtor's state simply says that, for reasons best known to herself, she will not arbitrate.

Mr. MARBURG. I take it that Mr. Bouvé refers to contractual debts.

Mr. BOUVÉ. Yes; that is what we were referring to.

Mr. MARBURG. And not to cases of violence?

Mr. BOUVÉ. No; to contractual debts.

Mr. MARBURG. We might say that force, under extreme necessity, would be justified in order to bring up the moral tone of the world. That is the only ground on which, to my mind, such a proceeding can be justified. But my point is that the evils of war are so horrible that they outweigh the benefit that can result from the use of force, and that the nation which breaks its faith with for-

eigners will find the folly of such a course by not being able to borrow, so that it will find it inexpedient to continue that process. Through normal operations the rate of interest to such a nation would gradually be raised.

The point about which Mr. Bouvé particulary inquires is as to the remedy to our citizen whose contract has been violated.

Here I should say that the man who enters into a contract ought to enter into it with full knowledge of the risks. He knows or ought to know, when he deals with such a government, that the chances of repayment are not as good as when he deals with a country like England or Germany. The very difference in the rate of interest indicates that he has that knowledge, and that alone ought to be a safeguard. The results of war are so disastrous that we ought not to resort to it in order to recover the property of a citizen who has taken those chances.

Mr. Bouvé. Mr. Chairman: Why should not the argument of voluntary assumption of risk apply equally to an American citizen who obtains a concession from one of our sister republics, and those concessions are arbitrarily withdrawn? Would the gentleman say that in cases where it is the defined policy of our country to protect by diplomatic intervention, that such protection ought not to be extended?

Mr. Marburg. In reply to that, Mr. Chairman, I have tried to make my position clear, although I may have expressed it awkwardly. I should exclude utterly the use of force in reference to contractual debts.

Mr. Larrinaga (the Delegate from Porto Rico). I wish to say, Mr. Chairman, that I am not a lawyer, and not for a minute would I assume to appear in this discussion of the legal principles; but I want to state to the gentlemen here some facts I have come across. I have always taken a good deal of interest in the work of this Society and I was deeply interested in the discussion of this subject by the two gentlemen who have just spoken.

I thought it was my duty to present to you a few facts. I am an

old man, and I thought it was my duty to present to these gentlemen a few facts that, in the course of my life, I have been able to absorb in my country, Porto Rico, before the American occupation. It is a well-known fact in Porto Rico, Mr. Chairman, that corporations and commercial houses and men doing business, mostly Germans, have always been willing to take the chances of doing business outside of what you call the pale of the law and to make a thriving business for a time, until the deal changes, and then they cling for protection to their own country.

This is a fact that has obtained in my country and that I believe obtains in almost every country, mainly in Central and South America, with which I am more conversant.

This is all I want to present to the Society — that there are many instances I have known of in my own country, where foreigners, mostly Germans, as I have stated, have taken the chances of making a very good business out of some deal which they knew was illegal, and yet when the business failed to be so good then they cling to the protection of their country.

Just now we have before the House of Representatives in Washington a bill to amend our organic act, commonly known as the Foraker Act. In the matter to which that refers, not only Germans, but Americans are involved. There is a provision of the law which forbids them from acquiring more than 500 acres of land. This mostly refers to sugar land. These corporations have gone there and bought, by some means or other, thousands of acres of land. The author of the bill failed to provide any penalty for the breach of that provision of the law.

I do not know whether I express my idea clearly; but in our organic act there is a section hindering any corporation or individual that did not have them already, from acquiring more than 500 acres of land. They have gone there and have bought thousands of acres of land and they have been violating the law. Now they come and appeal to the Committees of the House and are working desperately to have this amendment defeated, so that the present organic act will remain and they will be able to continue their practice without being amenable to any penalty within the law.

Mr. Bouvé. I would just like to say a few words in reply to the gentleman who has spoken of facts, and therefore I will simply answer as to facts. I do not think he can have understood the article that was read to contend that this country would, as a matter of national policy, ever support the claim of a man who has taken what you might call an illegal chance. The State Department will not entertain such cases. What I have said is this: that, as a matter of international law, apart from the question of national policy, this country has the right to interfere in cases where a foreign country has merely broken a contract, and it is its policy to interfere where the breach of the contract is accompanied by a tortious act.

Mr. Lansing. I would like to ask one question which is quite pertinent to this discussion. The Dominion of Canada, or the Province of Quebec, has granted timber leases to American companies for the purpose of cutting wood and shipping the logs from there to be manufactured into wood pulp in America. The Province of Quebec now prohibits the export of those logs, on the theory that they must be manufactured into pulp in Canada. Is that a case where our national policy would be one of intervention or the use of force?

This is not a new question, because we had identically the same question raised some years ago in regard to the shipment of lumber purchased in the Province of Ontario. After the Americans had made the purchases and erected their mills, on the American side, Canada, or the Ontario Government, imposed a tax which practically prohibited the export of logs to the United States, and the result was that millions of dollars involved were lost.

Is it the national policy of the United States, in a case like that, not to intervene or to use force?

I am not saying which side I take in this matter; but I just present it as a question, and one which does not involve nations which are not of the very highest moral sense.

Mr. Clarke. In the case suggested by Mr. Lansing, the alternative is not to use force, as he seems to suggest. To say what the

State Department would do is a problem which it is not for me to answer. But I will say this: in view of the relations between the great nations of America and Great Britain, there will never come a day when there will be a resort to force in such a claim. Unquestionably, under the policy of the Government of the United States, there would be diplomatic interference to the extent of attempting to obtain justice between nations and citizens, and the result of that attempt would be what has happened before between those great nations of high civilization — not war, but a resort to the courts of Canada or to international arbitration, such as is being had to-day in the Fisheries Case.

These questions are partly questions of absolute ethics and partly of relative ethics. On the question of ethics there can be no doubt about the principles laid down in the paper I have just read to this Society; but the question of relative ethics is quite another matter. On the question of relative ethics, each claim must be taken up, in the first place, by the government to which it is presented and weighed with reference to its own justice and honesty.

The particular question submitted by the gentleman from Porto Rico, if presented to the State Department, would never lead to diplomatic intervention, or open rupture.

As expressed in my paper, it would be a most outrageous condition that could result from the enforcement of a theory, if we should go to the extent of claiming that, on a contract, war with England would be justified. As to that I wish to say right here that expediency would veto the absolute ethics of the proposition. In other words, the relative ethics of time, place and circumstance would intervene.

But the case is altogether different where you have the power to enforce the absolute ethics, and where the nation is attempting an act of injustice. There it is right that you should use the power you have, and insist upon enforcing the recognition between natons of the absolute ethics, so far as you have the power to do it.

The CHAIRMAN. If there is no further discussion we will proceed to the next order of business, which is the preliminary report of the Committee on Codification.